

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7009

To be argued by
STUART D. WECHSLER

IN THE
United States Court of Appeals
For The Second Circuit

WILLIAM R. VAN GEMERT, ALBERT A. HENNING, EDWARD E. HOUCHINS, NATHAN PEARLMAN, ELIAS A. CHARIOTT, CHARLES K. DAVIS, ANDREAL HOLDING CORP., SAMUEL A. WEISS, IRWIN L. ISERT, JACK KIRSCHNER, CHARLES FRIEDMAN, H. MICHAEL ALBERS, ABRAHAM STERN, EDWARD KEMPLER, SIMEON A. SCHLOSS, JR., MARY JANE SCHLOSS SILVERMAN, SIMEON A. SCHLOSS, JR., and MARY JANE SILVERMAN, Trustees under the Last Will and Testament of Floretta Schloss Wile, DAVID M. BOTSFORD, MRS. SAMUEL LEMLER, LOUIS DAVIS, MRS. LEONARD C. DILL, JR., JOSEPH SCHLAGMAN, NATALIE K. WIGLER, ANN LOUISE DIAMOND, SAMUEL CHARD-VOYNE, WILLIAM M. JONES, MR. & MRS. H. DIENEMAN, MILTON HART, MARY LEVIN, FRANCES DAVIS, E. JULIAN DAVIS, ROBERT LEMLICH, ARTHUR FRISCH, MARIAN S. MITCHELL, VINCENTE J. BONNARD, HAROLD M. WHITE and MARGARET C. WHITE, MORRIS BERNSTEIN, WALTER L. EATON, ERNEST G. ANGEVINE, ABRAHAM PERCHICK, COMMITTEE FOR THE ESTATE OF MAX SCHNEIDER, an incompetent, FRANCIS H. SHOUBE, and ALBERT A. ARDITTI, GERTRUDE McNAUGHT, MRS. J. H. STEIN, JOAN S. BERMAN, J. DAVID STEIN, SARAH E. MORITZ, VIRGINIA W. STAUB, LOUIS BERGLAS, DR. JACK DIENER, DENNIS J. FINN, BERTHA J. WINER, JOANNE W. FINN and S. EDWARD MITTLER, for and in behalf of themselves and for all other holders of the BOEING COMPANY 4½% Convertible Subordinated Debentures, due July 1, 1980 who are similarly situated,

Plaintiffs-Appellants,

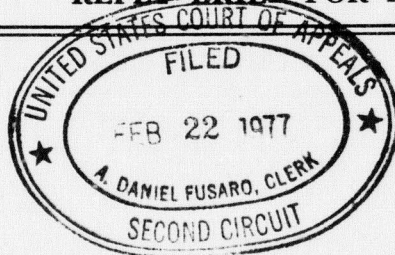
vs.

THE BOEING COMPANY (formerly BOEING AIRPLANE COMPANY), CLAIRMONT L. EGTVEDT, WILLIAM M. ALLEN, EDWARD J. WELLS, JAMES E. PRINCE, LOWELL P. MICKELWAIT, W. L. CAMPBELL, ARTEMUS L. GATES, CRAWFORD H. GREENEWALT, WILLIAM G. REED, D.E. SKINNER, THOMAS R. WILCOX, JOHN O. YEASTING and GEORGE H. WEYERHAEUSER,

Defendants-Appellees.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS



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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
VAN GEMERT, et al., :
Plaintiffs-Appellants, : 77-7009
-against- :
THE BOEING COMPANY, et al., :
Defendants-Respondents. :
-----X

APPELLANTS' REPLY BRIEF

PRELIMINARY STATEMENT

The relevant facts on this appeal are discussed in this appellant's main brief, and will not be repeated herein.

The purpose of this brief will be, primarily, to discuss issues raised in the answering brief of the defendants-respondents, and which may not be fully addressed in plaintiffs-appellants' main brief.

REPLY

REPLY POINT I

THE JUDGMENT IN THIS ACTION, BEING ONE AT LAW,
AND EXCLUSIVELY FOR MONEY DAMAGES, IS NOT
EQUITABLE IN NATURE AND, CONSEQUENTLY, THE
AWARD OF PRE-JUDGMENT INTEREST THEREON IS
MANDATORY UNDER THE PROVISIONS OF CPLR §5001(a)

The prior opinion of this Court (A87-116) dated July 14, 1975, determined that the notice of call by defendant The Boeing Company ("Boeing") of its convertible debentures was inadequate and unreasonable (A 106-112).

That opinion is based upon the principles of both contract and property law. The Court expressly held that:

"The duty of reasonable notice arises out of the contract between Boeing and the debenture holders, pursuant to which Boeing was exercising its right to redeem the debentures." (A 107).

Thus, the Court states a contract basis for its determination that members of the class are entitled to recover. The Court also identifies a property law basis for its determination (A 110, last paragraph), thereafter returning to the contract analysis (A 111, top of page). The argument by defendants-respondents (Brief p. 9-10 and 14-15) that the prior determination of this Court is based neither on contract nor property law, and the decision of the District Court, to the extent that it so holds, fly in the face of the express language of the Court.

Plaintiffs are not alone in their understanding of the prior opinion of this Court. The comment on the Court's opinion in 42 Brooklyn L. Rev., states:

"The court seemingly surpassed their [i. e. plaintiffs'] expectations by predicated civil liability on a contract... between the plaintiffs and Boeing independently." 42 Brooklyn L. Rev. 1259, 1272.

The action was remanded to the District Court for the determination of damages (A 112), and, the District Court, in its opinion, (A 352-361), determined the money damages to which the plaintiff class was entitled. (From which determination the instant appeal was taken.)

The assertion by defendants-respondents at page 4 of the answering brief that Boeing alone was given the option of giving stock or the cash equivalent is totally at variance with footnote 23 of this Court's prior opinion (A 111-112). Similarly, the characterization of the relief awarded (on page 5 of the answering brief) as being "\$3,289,359 should all members file appropriate proofs of claim..." is incorrect and in conflict with both the decision of the court below (A 352-361) and the judgment and order which awards judgment in the sum of \$3,289,359 (A 364).

Whether the prior decision of this Court was based upon the principles of contract or property law, or

both, the plaintiff class is entitled to prejudgment interest as of right under the provisions of §5001(a) of the CPLR.

That section states:

"Interest to verdict, report or decision

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."

Both the plaintiffs-appellants and the defendants-respondents agree that the applicable law on the question of prejudgment interest is the law of New York. (answering brief pages 13-14 and footnote, page 14.)

In commenting upon §5001(a) of the CPLR, 5 Weinstein Korn and Miller, New York Civil Practice ¶5001.05 notes at page 50-19,

"CPLR 5001(a) is phrased broadly and is designed to obliterate all distinctions that may turn on the form of the action (except as to actions of

an equitable nature...), the type of property involved, the nature of the encroachment upon the plaintiff's property interests, or the nature of the damages suffered. Thus, interest is available for the tortious interference with intangible, as well as tangible, property whether or not the property has been physically damaged.

In some cases there will be an overlap between the right to interest under both the contract or the property clauses of CPLR 5001(a). For example, in an action for the return of money lent because of non-performance or fraud on the part of the defendant, it makes no difference whether the action is considered one for rescission or for conversion." (footnotes omitted)

This Court, in commenting on the present language of CPLR 5001(a) has held in Spector v. Mermelstein, 485 N.Y. 2d 474, 482 (1973) that, even an unintentional or negligent interference with, or damage to property, would entitle plaintiff to preverdict interest:

"among other changes, the provision modifies prior law by making the award of preverdict interest a matter of right not only on claims for property damage intentionally inflicted but for property damage caused by negligence. The latter had often been viewed as discretionary."

In a situation analogous to the instant case involving an award of damages equal to the value of shares of a corporation's stock as of the time that the plaintiff would have been entitled

to receive those shares from the defendant corporation, this Court has held, in Kaufman v. Diversified Industries, Inc., 460 F. 2d 1331, 1338, (2d Cir. 1972) cert. denied 409 U.S. 1039, that the plaintiff is, under CPLR §5001(a), entitled to prejudgment interest. Accord, Marx & Co., Inc. v. Diners' Club Inc., 405 F. Supp. 1 (S.D.N.Y. 1975).

The portion of CPLR §5001(a) relating to actions of an equitable nature is wholly irrelevant, since the Court: (1) did not award equitable relief, and (2) based its decision upon legal rights and not upon any doctrine of equitable relief. Indeed, this Court, by remanding for determination of money damages, and the District Court, by awarding money damages as the sole and complete remedy, acknowledged that in the present action money damages would afford a complete relief for the members of the plaintiff class. Consequently, both courts have, in effect, held that there is no equitable jurisdiction in this action and that it cannot be "an action of an equitable nature" as contemplated by the exception contained in CPLR §5001(a).

With the merger of law and equity in New York, the remaining distinction between law and equity is the type of remedy which is applied. Cox v. City of New York, 265 N.Y.

411, (1934) cert. denied 294 U.S. 729.

Furthermore, it has long been recognized in New York that, even an action which may start out as one seeking both equitable relief and damages at law, once it has been determined that the plaintiff is not entitled to equitable relief, proceeds as one at law for damages.

Sternberger v. McGovern, 56 N.Y. 12 (1874); Haffey v. Lynch, 143 N. Y. 241 (1894); Wheeler v. Standard Oil Co., 237 App. Div. 765 (1933) reversed on other grounds 263 N.Y. 34 (1933). As stated in 20 N.Y. Jur. Rev., Equity §4, p. 14:

"A claim for damages in the alternative may be joined with a prayer for equitable relief, and if the equitable relief is denied, the action will be retained but the issues in respect of the damages are to be tried as an action at law." (footnote omitted)

Thus, even in a truly equitable action, in which plaintiff seeks both damages at law and equitable relief, where a court declines to award the equitable remedy, and proceeds to award the plaintiff his damages, the action is strictly one at law for damages. Such an action would not be "an action of an equitable nature" within the exception to CPLR §5001(a).

The exception contained in CPLR §5001(a) relating to actions of an equitable nature applies only in actions in which equitable relief such as foreclosure or an accounting

has been sought and granted. See for example Bosco v. Alicino, 37 App. Div. 2d 552 (1st Dept. 1971) (action to reinstate judgment) and Jackson v. Hunt, Hill and Betts, 20 App. Div. 2d 458 (1st Dept. 1964) (action for partnership accounting).

In summary, the judgment to the plaintiff class falls squarely within the designation by CPLR §5001(a) of actions in which prejudgment interest is mandatory. It was error for the District Court to decline to award such prejudgment interest to the plaintiff class herein.

REPLY POINT II

ASSUMING ARGUENDO, THAT THE PRESENT ACTION COULD BE DEEMED TO BE EQUITABLE IN NATURE, AND, THEREFORE ONE IN WHICH PREJUDGMENT INTEREST IS DISCRETIONARY, FAILURE TO AWARD SUCH INTEREST UNDER THE CIRCUMSTANCES OF THIS CASE WOULD CONSTITUTE AN ABUSE OF DISCRETION.

Plaintiff-Appellants have, we believe, demonstrated that CPLR §5001(a) mandates the award of prejudgment interest in the present action. Nevertheless, if it be assumed, arguendo, that the exception set forth in CPLR §5001(a) making the award of prejudgment interest discretionary in actions of an equitable nature, has application to the action at bar, it would constitute an abuse of discretion to decline to award prejudgment interest under the circumstances of this case.

The Court is respectfully referred to pages 9 through 10 of our main brief on the question of the inequity and abuse of discretion resulting from the District Court's refusal to award prejudgment interest.

The answering brief of defendants-respondents asserts, at page 19 thereof, that members of plaintiff class could have had the use of "their original investment by redeeming their Debentures as indeed most have" (emphasis added). This, however, begs the question. The issue here is the loss of the use of the value of the shares the class members would have if they received adequate notice. Defendants-respondents also omit to even consider the lost dividends on the Boeing shares which would have accrued to members of the class over the past eleven years. From Boeing's point of view, it was benefited by retaining dividends and shares which would otherwise have gone to members of the plaintiff class. Boeing also had the benefit of being free to issue such shares to others for cash or in exchange for property.

It should also be pointed out that the denial of prejudgment interest in the circumstances of this case will be contrary to public policy. In addition to providing the defendants herein with an unjustified bonanza, it will serve to put a premium upon delay and dilatory tactics in actions such as these by defendants hoping to obtain, for as long

as possible, the free use of funds rightfully belonging to the plaintiff class. In the present action, prejudgment interest through February 1, 1977, at the prevailing legal rates amounts to a minimum of in excess of \$2.5 million, and more than two-thirds again the amount of the damages due to the class. A judgment which does not include prejudgment interest, does not make the members of the plaintiff class whole, and would constitute a gross abuse of discretion.

REPLY POINT III

THE ISSUE OF THE FUND TO BE CREATED FOR THE BENEFIT OF THE CLASS, AND THE METHOD OF DISTRIBUTION THEREOF ARE RAISED BY THE ORDER AND JUDGMENT HEREIN AND SHOULD BE DETERMINED IN ACCORDANCE WITH THE MAIN BRIEF OF THIS PLAINTIFF-APPELLANT.

The issue of the creation of a fund and the proper method for the distribution of said fund to the members of the class has been raised by the wording of the judgment and order signed by Judge Ryan in this action, and filed on December 28, 1976. (A 364-365) The notice of appeal filed by this plaintiff-appellant (A 367) appeals from that judgment and order. This plaintiff-appellant believes that the said judgment and order is not in accordance with the opinion of Judge Ryan (A 352-361), and is, in certain respects, ambiguous. As a result, a modification of the judgment and order in this action are properly before this Court, and are discussed in Point III of this plaintiff-appellant's main brief.

The question of the method of award of counsel fees, raised for the first time in the answering brief of defendants-respondents (Answering Brief Pages 31-32) is premature and not properly before this Court. The defendants-respondents raise the question here upon the speculative theory that a portion of the class will not make claim for their damages. The defendants-respondents are wrong in any event since the fund from which such fees are to be awarded is established by the amount of the judgment for the class as awarded by the District Court or as such amount may be modified by this Court. Application for counsel fees in this action has not even been made as yet, and the question of the source and computation of such fees is not raised by the judgment and order appealed from. The question of counsel fees and disbursements is relevant to the question of the propriety of the judgment and order in the court below only to the extent that it is necessary to recognize that such counsel fees and disbursements will represent a claim against the fund to be established.

A proper judgment in the within action, in order to comply with Judge Ryan's opinion, or with any adjustments thereof which may be made by this Court, must provide for judgment on

behalf of the class in the total amount of the damages found by the Court to have been suffered by the class. The judgment and order appealed from, while providing for judgment in the sum of \$3,289,359, is ambiguous, in that certain of the language contained therein may be interpreted as meaning that the defendants need only pay individual claims of particular members of the class as they are received, and may, in addition, deduct from the claim of such individual class members, the fees and expenses applicable to the class as a whole. Such a procedure would not only be improper, but, unfair to the members of the class. This is particularly so in the context of an action which, by reason of the delay occasioned by the defensive tactics employed by the defendants, may result in a large number of class members who, although identified, have over the period of the eleven years of this litigation: become impossible to locate, lost and/or forgotten the bonds, or died.

Point III of this plaintiff-appellant's main brief, directs itself to: (1) the question of whether the defendants

should be required to pay the full amount of the damages due to the class, and (2) the distribution, thereafter, of proportionate shares of the fund to the members of the class.

As previously discussed in connection with the question of prejudgment interest, there is a serious question of public policy which must be considered in connection with the interpretation of the judgment urged by the defendants-respondents. If the defendants are permitted to pay only those members of the class who make claim for their portion of the class judgment, and to retain the proportionate share of the judgment applicable to non-claiming members of the class, it will place a premium on delay, foot-dragging and dilatory tactics on the part of the class action defendants. By dragging an action out over eleven years, or perhaps even longer, class action defendants will be able to substantially cut down on the number of class members making claim upon the class fund, and, though they may eventually lose the action, reduce their liability to a fraction of the actual damages suffered by the class. Delay will become the principal ingredient in the defensive strategy of every class action defendant. Such a precedent should not be established.

The arguments of the defendants-respondents that the damages in the within action must be paid to the individual class member claimants, only up to the lost value of the Boeing shares into which their debentures could have been converted on the date fixed by the court has been considered by the Supreme Court and rejected in the analogous case of Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 493-494 (1968). In that case, the defendant in an antitrust action similarly sought to reduce the damages due to the plaintiff by arguing that the plaintiff would be compensated in excess of the actual monetary loss because the unlawful higher prices charged to the plaintiff had in turn been passed along to the plaintiff's customers. Thus, argued the defendant, the plaintiff would be compensated in excess of the actual out-of-pocket loss. The Supreme Court rejected the defendant's theory, which is essentially the same theory put forward by the defendants-respondents, holding that those who violate the antitrust laws may not retain the fruits of their illegality merely because members of the class harmed by the unlawful acts have not brought actions or made claim for reimbursement. 392 U.S. at 494. See also, State of West Virginia v. Chas. Pfizer & Co., 440 F. 2d 1079 (1971) cert. denied 404 U.S. 871 (1971).

Various courts have developed procedures to avoid allowing a defendant to retain the fruits of his illegal conduct. As

indicated above, the Supreme Court in Hanover Shoe found no objection to permitting the plaintiff making the claim to obtain more than his actual out-of-pocket damages where other consumers had shown little interest in attempting a class action. In State of Illinois v. J.W. Petersen Coal & Oil Co., an action brought in the United States District Court for the Northern District of Illinois, Eastern Division, civil action no. 71 C 2548, in which unclaimed shares of a settlement fund remained because a significant number of claimants would receive sums so small that they had not bothered to submit claims, the excess monies in the fund were not returned to the wrongdoers. In an unpublished order, Judge Hubert L. Will, at the suggestion of the counsel for plaintiffs, ordered that the amount remaining in the fund be donated to a cause which served the general interest of the members of the class as a whole.*

The "fluid class recovery" argument raised by the defendants-respondents in their answering brief (page 30) is wholly irrelevant, and their reliance upon Eisen v. Carlisle &

* A copy of Judge Will's order is included as an addendum to this brief.

Jacquelin, 479 F. 2d 1005 (2d Cir. 1973), aff'd, 417 U.S. 156 (1974) is misplaced.*

The Eisen decision cited by defendants-respondents is on the question of whether a class exists within Rule 23. The Eisen court determined that a class action may not be based upon a fluid class in which the damages, if they could be determined, would go to benefit persons who would not necessarily even be members of the class. There is no element of fluid recovery proposed by plaintiffs in the instant action. This action is maintained on behalf of a clearly defined and identifiable class. As pointed out in our main brief, this has already been determined by Judge Ryan in his opinion on the application for a Rule 23 order (A 58-75). Indeed, in the present action, the defendants already have, in their possession, the identity of 85% or more of the members of the class. The recovery in the present action will go only to the members of the class.

* It should be noted that the quotation from the Eisen case on page 30 of the defendants-respondents brief, is taken out of context, and is inaccurately quoted so as to appear as if the sentence ends with the word "processed." Furthermore, the quoted material which is set forth in the brief of the defendants-respondents in such a way as to appear to be the holding or, at least, the dictum of the Eisen court, is actually part of a hypothesis posed by the court in order to make a point about the difficulty and relative expense of an Eisen type class action.

This plaintiff-appellant respectfully urges that the appropriate procedure with respect to the judgment on behalf of the class is the deposit in escrow, by the defendants, of the amount of the judgment, the award therefrom of counsel fees and disbursements, and the pro-rata distribution of the remainder of the fund, after the award of counsel fees and disbursements, to the members of the class. As pointed out in the main brief of this plaintiff-appellant, the class designated herein (A 70-75) is a Rule 23(b) (1) class with no provision for requests for exclusion. All class members will be bound, with no right of any member to opt out. It was the defendants who sought Rule 23(b) (1) class treatment; they should be estopped from trying to deprive this "true" class sought by them of its full damages. As a result, all identified and identifiable members of the class are entitled to a pro-rata distribution of the fund, after the deduction therefrom of the expenses of the class including counsel fees and disbursements.

Although we believe that questions with respect to the method of computation of counsel fees are not properly before this Court, the defendants-respondents are, in any event, wrong in their contention that counsel fees are not awarded based upon the fund created for the class by the judgment herein. The traditional basis for the award of counsel fees in class actions

has been the recognition that when the plaintiff and his counsel have created a fund which benefits not merely the plaintiff-cleint, but all members of the class, counsel are entitled to receive a fee, and plaintiff is entitled to be reimbursed for his expenses out of the fund created. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970); Fleischmann Distilling Corp. v. Maier Brewing Corp., 386 U.S. 714, 719 (1967).

The cases of City of Detroit v. Grinnell Corp., 495 F. 2d 448, 470 (2d Cir. 1974); Green v. Wolf Corp., 69 F.R.D. 568, 570-71 (S.D.N.Y. 1976); and Blank v. Talley Industries Inc., 390 F. Supp. 1, 6 (S.D.N.Y. 1975) do not support the statement (for which they are cited at page 32 of the brief of the defendants-respondents) to the effect that attorneys' fees are governed by the amounts recovered by actual claimants rather than the maximum benefit conferred upon the class. Plaintiffs-appellants do not believe that the holdings of courts with respect to fee applications based upon negotiated settlements are necessarily or properly controlling in the case of a judgment, for the entire amount by which the class has been damaged, obtained after trial. Nevertheless, the portion of the Green decision cited by the defendants-respondents finds that the attorneys in that action were entitled to the award of attorneys' fees upon the basis of the agreed maximum settlement, and not upon the basis of the number of persons who may actually claim their portion of the settlement fund.

In the Antibiotic Antitrust Actions, 410 F. Supp. 680, 689 (D.C. Minn. 1975) the court takes note that:

"If counsel for a particular class had pursued litigation to a successful end, to the benefit of the class, then each member of the class should, in turn, be called upon to adequately reward the attorney." (Emphasis supplied.)

The court did not make any distinction based upon members of the class who did not submit claims.

The only case cited by the defendants-respondents, which in any way supports their contention is Blank v. Talley Industries, supra., again, a settlement case. However, while the court in Talley Industries does take note of the fact that 25% of the members of the class did not avail themselves of the settlement, and states the questionable proposition that there is no reason why the attorneys should be compensated for benefits not accepted by members of the class, there is no indication that this dicta played any part in the award of counsel fees in that action. Indeed, the Talley court is at pains to indicate that its award of fees is based upon its estimate of the number of hours expended by counsel for plaintiff multiplied by what the court believes to be a reasonable hourly rate for partner's and associate's time, to which figure the court has added a stated percent based upon the risk factor inherent in contingent litigation.

Returning, in conclusion, to the required modification of the judgment and order of the District Court, plaintiff believes

that the judgment and order must, in addition to granting judgment to the class in the total amount which this Court determines to be appropriate, provide for the amount of said judgment to be deposited in escrow, and after the payment of such attorneys' fees and disbursements as may be awarded, distributed to the members of the class on a pro-rata basis.*

In the event that this Court does not agree with the procedure urged by this plaintiff-appellant with respect to the modification of the judgment herein, it is respectfully submitted that, in the alternative, the judgment in this action should provide that the defendants be directed to deposit in escrow a fund in the total amount of the damages awarded to the class, that counsel fees and disbursements be awarded out of this fund and that thereafter, the identified and identifiable members of the class receive a distribution of a pro-rata share of the fund up to the total amount of their damages or, in the

* The suggestion, advanced in a Footnote on pages 29-30 of the answering brief that debentureholders have a full twenty years to file a proof of claim is at variance with the procedure adopted by any court in connection with judgments entered in any class action, and would serve to make the class action procedure unworkable. The provision referred to by defendants-respondents is one for the protection of judgment creditors who hold judgments against judgment debtors, but are unable, at the time of judgment to locate any assets against which to levy. That is clearly not the case herein, and such a provision should not be converted into a tool to hobble the Rule 23 class action procedure.

further alternative, up to the total amount of their damages less a proportionate share of the counsel fees and disbursements awarded by the court. Undistributed shares of the fund, if any, resulting from the two alternative procedures, would be retained in escrow subject to the continuing jurisdiction of the court, for distribution if, as and when additional members of the class are located and, with the court to schedule a further hearing at a future date for determining the disposition of any amount remaining in the fund. At that time, the court could fully consider such possible dispositions as further pro-rata distribution, additional fees, donation to a cause of general interest or treatment as abandoned property.

Parenthetically, counsel for this plaintiff-appellant believe that it is quite likely that there will not be any substantial undistributed portion of the fund since the defendants have indicated that they are in possession of the names of at least 85% of the members of the class, and, if those persons make claim for their portion of the fund, given the fact that counsel fees and disbursements will have to be deducted, it appears to this plaintiff-appellant unlikely that those making claim upon the fund will receive reimbursement for their total loss; much less any amount greater than their damage.

Were Boeing to prevail in its argument herein, it would indeed be the ultimate irony in this bitterly fought eleven year old litigation. This Court has already held that Boeing is liable to the class for failing to adequately notify them. Yet, Boeing now seeks to escape the consequences of its callous indifference to its debentureholders by: (1) not paying them interest; (2) obtaining back the damages awarded to the class because less than all of the injured bondholders can be located or submit claims; and (3) reducing the shares of the fund to be paid to claiming bondholders by deducting a pro-rata portion of the legal fees allowed from the shares of claiming class members rather than paying such fees out of the gross amount of the damages for which Boeing has been found liable as embodied in the judgment.

CONCLUSION

The relief requested in plaintiff-appellant's main brief should in all respects be granted.

Respectfully submitted,

KASS, GOODKIND, WECHSLER &
GERSTEIN
Attorneys for Appellants Van
Gemert, Henning, Houchins,
Pearlman and Chariott

Of Counsel:

Stuart D. Wechsler
William A. Kass
Joseph Sternberg

A D D E N D U M

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STATE OF ILLINOIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 71 C 2548
	)	(And All Consolidated Cases)
J. W. PETERSEN COAL & OIL	)	
CO., et al.,	)	
Defendants.	)	

O R D E R

At the suggestion of co-lead counsel for plaintiffs, the Court being advised that the amount of money remaining in the Chicago Coal Merchants Settlement Fund which is available for distribution is less than \$45,000 after deducting the expenses of distribution, and that said distribution would be for less than 1¢ per ton claimed, the Court being further advised that a significant number of claimants would receive less than \$1.00:

THE COURT FINDS that it is in the interest of the class that the balance remaining in the Chicago Coal Merchants Settlement Fund after payment of expenses be donated to a cause which serves the general interests of the members of the class as a whole;

IT IS HEREBY ORDERED that the following disbursements be made from the Chicago Coal Merchants Settlement Fund:

(1) Payment to the claimants listed on Appendix A attached hereto in amounts per ton equal to the original distribution; and

(2) Payment to Mid America Computer Corp. in the amount of \$1,528.25.

ENTER:

/s/ HUBERT L. WILL
HUBERT L. WILL
District Court Judge

January 13 , 1975

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

John F. Farrell III, being duly sworn, deposes and

says, that he is over 18 years of age. That on the 22nd day of

February, 1977, he served *2 copies* of
the attached *Reply Brief for Plaintiffs* on
Appellants
the attorney *S* for the *Defendants-Appellees*

herein by depositing the same, properly enclosed in a securely sealed

post-paid wrapper, in a U. S. Post Office at 90 Church Street, New

York City, directed to said attorneys *at as follows:*
Hughes Hubbard & Reed, Esq.
Atlantic Richfield Plaza
Los Angeles California 90071

that being the place where they maintain their offices for the

regular transaction of business, and the last address mentioned in

the papers last served by *thcn*

Sworn to before me this

22 day of *February*, 1977.

Monroe D. Rosen

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4616690
Qualified in Kings County
Commission Expires March 30, 1977

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

John F. Farrell II, being duly sworn, deposes and
says, that he is over 18 years of age. That on the *22nd* day of

February, 1977, he served 2 copies of
the attached *Reply Brief for Plaintiffs-Appellants* on
the attorney *S* for the *Defendants Appellees*

herein by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a U. S. Post Office at 90 Church Street, New

York City, directed to said attorney as at follows:
Perkins, Coie, Stone Olsen & Williams, S.P.A.
1900 Washington Building
Seattle, Washington 98101

that being the place where they maintain offices for the
regular transaction of business, and the last address mentioned in
the papers last served by them

Sworn to before me this

22 day of *February*, 1977.

Monroe D. Rosen

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4616690
Qualified in Kings County
Commission Expires March 30, 1977

Two (2)
Service of three ③ copies of the within

COPY RECEIVED	is admitted this 22 nd day of February 1977
TIME 2:5 PM	
FEB 22 1977	
DAVIS POLK & WARDWELL	Attorney for Defendant - Appellees

I STEINMAN

Attorney for Plaintiff - Appellants

Nathan, Mannheim, Asch, Wines &
Friedman by Norman Steinman
Attorney for Plaintiff - Appellants